four MSAs at issue. To the contrary, the comments clearly demonstrate that in the overwhelming majority of cases there are no viable alternatives to the use of Qwest's network facilities and services and, thus, that forbearance from Section 251(c)(3) unbundling requirements would have a catastrophic impact on competition.

IV. GRANTING FORBEARANCE WILL EFFECTIVELY RESULT IN A DUOPOLY IN THE FOUR MSAS FOR WHICH REGULATORY RELIEF IS SOUGHT

As explained in many of the comments, currently there is insufficient competition – from cable providers or others – to justify forbearance in any wire center in any of the four MSAs for which Qwest has sought deregulation.[93] Further, the limited non-cable competition that does exist in those MSAs is dependent on the continued ability to access Qwest's loops and transport facilities pursuant to Section 251(c)(3). Consequently, if access to Qwest's loops and transport facilities under Section 251(c)(3) is eliminated, it is highly likely that the only entities that will be able to remain in the market to compete against Qwest will be the cable companies, to the extent those entities are able to provide service through use of their own facilities.[94] As discussed in Section III, *supra*, this is what has occurred in the Omaha MSA as a direct result of the premature grant of Section 251(c)(3) forbearance to Qwest in portions of that market.

Qwest no doubt will argue that cable competition alone will sufficiently discipline its pricing behavior to permit forbearance from federal unbundling requirements. As the Colorado PUC pointed out, however, that claim is frivolous.[95] The duopoly market that would result would not be competitive. The Colorado PUC noted the well-established economic principle

93 *See, e.g., Washington State Public Counsel Comments*, at 4; *NASUCA Comments*, at 2-3.

94 As seen in the Anchorage forbearance proceeding, in some cases cable operators rely on ILEC Section 251(c)(3) UNEs or other wholesale facilities to provide service, especially to enterprise customers. *See Anchorage Forbearance Order*, at ¶ 36.

95 *See Colorado PUC Comments,* at 13.

> that [e]ffective competition requires that firms have independent sources of supply, that is, self-supply. Given the cost characteristics of this industry, some mixture of facilities-based provision, unbundled element provision, and resale provision seems to be desirable – if not imperative – in order to increase the number of suppliers and increase consumer choice. Simply, it is not only unwise, but economically impossible for five or more facilities-based providers to divide the existing market in the Denver MSA. A mix of providers and production methods . . . is necessary. *The tight duopoly, which would develop if forbearance is granted, will not provide the benefits of competition contemplated by the 1996 Act and in economic literature.*[96]

Notwithstanding its decision in the *Omaha Forbearance Order*, the Commission understands that entities in duopoly or oligopoly markets take their rivals' actions into account in deciding the actions they will take, and that "when market participants' actions are interdependent, noncompetitive collusive behavior that closely resembles cartel behavior may result – that is, high and stable prices."[97] The Commission has long recognized that

> [a]lthough competition theory does not provide a hard and fast rule on the number of equally sized competitors that are necessary to ensure that the full benefits of competition are realized, both economic theory and empirical studies suggest that a market that has five or more relatively equal sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.[98]

The D.C. Circuit agrees with this assessment, finding that "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to

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96 *Id.* (footnotes omitted, emphasis supplied).

97 *Application of Echostar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd 20559, ¶ 170 (2002) ("*Echostar Order*").

98 *2002 Biennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 289 (2002).

restrict output and achieve profits above competitive levels."[99] The court added that "a durable duopoly affords both the opportunity and the incentive for both firms to coordinate to increase prices . . . above competitive levels."[100]

In light of the significant possibility that premature elimination of Section 251(c)(3) unbundling obligations ultimately will result, at best,[101] in a Qwest-cable duopoly which will necessarily lead to less choice in service offerings and higher prices for consumers,[102] Qwest's request for forbearance from Section 251(c)(3) requirements in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs must be denied.

V. SECTION 251 HAS NOT BEEN FULLY IMPLEMENTED AS REQUIRED BY SECTION 10(D)

In *Qwest Omaha*, the D.C. Circuit found that the Commission's conclusion that Section 251(c) was "fully implemented" pursuant to Section 10(d) once it had promulgated rules implementing Section 251(c) and those rules had taken effect was not unreasonable.[103] The court declined to rule, however, whether the "fully implemented" requirement is broader, and requires an acknowledgment that both the states and service providers have a role in implementing Section 251(c).[104] The Joint Commenters maintain that the legal requirement is indeed broader and that the Commission should decline to grant Qwest forbearance from its

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99 *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001).

100 *Id.*, at 725.

101 A duopoly only will result in those circumstances where the cable provider is able to use its own facilities to provide service. If the cable operator is forced to rely on Qwest's network to reach customers – a situation that is especially prevalent with enterprise customers – Qwest will be the only carrier that can successfully compete.

102 *See* Comments of the New Jersey Division of Rate Counsel, WC Docket No. 07-97, at 3 (fled Aug. 31, 2007) ("*NJ Ratepayer Comments*") ("If the petitions are granted, consumers will be exposed to an unregulated duopoly without necessary safeguards to ensure that rates, terms and conditions are just, fair, and reasonable . . . "). *See also Time Warner Telecom Opposition*, at 11.

103 *Qwest Omaha*, Slip Op. at 12.

104 *Id.*, at 14.

unbundling obligations on the grounds that Section 251(c)(3) has, in fact, not been "fully implemented." As the Commission itself has previously recognized, implementation of Sections 251(c) and 252 involves substantial activity by the states as well as the Commission.

When adopting its initial rules to implement Sections 251 and 252 of the Telecommunications Act of 1996, the Commission acknowledged the shared federal and state responsibility to implement and administer Sections 251 and 252, concluding that "Congress envisioned complementary and significant roles for the Commission and the states."[105] The Commission determined that while "some national rules are necessary to promote Congress's goals for a national policy framework and serve the public interest, [ ] the states should have the major responsibility for prescribing the specific terms and conditions that will lead to competition in local exchange markets."[106]

Since Congress intended that the states share jurisdiction with the Commission to implement Sections 251 and 252, and that the states otherwise "play a critical role in promoting local competition,"[107] it cannot be the case that Congress intended Section 251(c) to be "fully implemented" merely when the Commission has adopted and published rules in the Federal Register. The Commission previously has recognized that its promulgation of Section 251 implementing rules is only the first step in the process of implementing Sections 251 and 252, stating in the *First Report and Order* that "[t]he steps we take today are the initial measures that will enable the states and the Commission to *begin to implement* sections 251 and 252."[108]

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105 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15,499, 15,557-58 (1996) ("*First Report and Order*").

106 *Id.*, at 15,520.

107 *Id.*, at 15,566.

108 *Id.*, at 15,507 (emphasis supplied).

The correct application of the Section 10(d) "fully implemented" requirement necessitates a review of state Sections 251(c) and 252 implementation efforts. The conclusion that Section 251(c) has been fully implemented must be predicated on the conclusion that both the Commission and the particular states in question (in this case, Arizona, Colorado, Minnesota, and Washington) have fully executed their obligations regarding Sections 251 and 252. Moreover, as the petitioning party, Qwest has the burden of proof to show that each regulatory entity has executed its responsibility to implement the local market opening requirements of Sections 251 and 252. Here, Qwest has proffered no such evidence. Consequently, the Commission cannot conclude that the Section 10(d) requirement has been met and Section 251 has been fully implemented.

Indeed, there is direct evidence that Section 251(c)(3) has not been fully implemented in at least one state. The Arizona Corporation Commission informed the Commission in its comments "that the Triennial Review Remand Order ("*TRRO*") has not been fully implemented yet in the Phoenix MSA. Qwest and the CLECs have entered into a recent Settlement Agreement regarding the application of the *TRRO* criteria with respect to Arizona wire centers which is still pending before the Arizona Commission for approval."[109] The Arizona Commission expressed "reservations as to the appropriateness of granting Qwest's forbearance in whole or in part" given that Section 251(c)(3) has not been fully implemented.[110]

VI. QWEST HAS NOT SHOWN THAT IT IS ENTITLED TO RELIEF FROM DOMINANT CARRIER OR COMPUTER III REQUIREMENTS

Numerous commenters showed that Qwest has failed to prove it is entitled to forbearance from Part 61 dominant carrier tariffing requirements, dominant carrier requirements

109 *Arizona Corporation Commission Comments*, at 3.

110 *Id.*

arising under Section 214 of the Act and Part 63 of the Commission's rules, or the Commission's Computer III rules, including CEI and ONA requirements. As noted by COMPTEL, "Qwest made absolutely no effort whatsoever to explain how or why" enforcement of these regulations and statutory provisions is not necessary to ensure that Qwest's rates, terms and conditions are just and reasonable and nondiscriminatory or to protect consumers.[111]

As noted by the Commission in the *Omaha Forbearance Order*, forbearance from dominant carrier regulation must be preceded by a finding that the ILEC seeking forbearance no longer has market power in the provision of the services for which it seeks forbearance.[112] Market share, supply and demand elasticities, and the firm's cost, structure, size and resources are all relevant to an analysis of whether the ILEC seeking freedom from dominant carrier regulation retains market power,[113] yet Qwest has not provided the type of information that would allow the Commission to conduct the required analysis for any of the four MSAs at issue.

Qwest's lack of proof is not surprising in light of the fact, noted by numerous commenters, that evidence in the public record belies Qwest's claims of robust competition. Indeed, EarthLink summarized the concerns of a number of commenters when it noted that forbearance from dominant carrier regulatory requirements would increase Qwest's ability to foreclose competition from developing. EarthLink stated:

> [G]ranting Qwest forbearance from Section 214 dominant carrier discontinuance requirements would make it even easier for Qwest to foreclose even the possibility of UNE-based competition in the Qwest territories. Qwest has the incentive and the ability to discriminate against competitors by decommissioning the critical copper loop

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111 *COMPTEL Comments*, at 9.

112 *Omaha Forbearance Order*, at ¶ 22.

113 *Id.*, at ¶ 31.

> plant that competitive carriers rely upon for the "last mile" access to their customers.[114]

In light of the fact that Qwest remains market power in the four MSAs at issue, continued application of dominant carrier and Computer III regulatory requirements is necessary to ensure just and reasonable, and nondiscriminatory rates and terms for the mass market, enterprise market, and wholesale market services Qwest provides. Consequently, Qwest's request for forbearance from dominant carrier and Computer III rules should be denied.

VII. CONCLUSION

For each of the forgoing reasons, and for the reasons set forth in the initial; comments of the Joint Commenters, Qwest's Petitions should be dismissed. If the Commission declines to dismiss the Petitions, it must deny Qwest the regulatory relief it seeks on the ground that Qwest has not met the statutory prerequisites for forbearance contained in Section 10 of the Act.

Respectfully submitted,
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[114] *EarthLink Opposition*, at 42.